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No. 87-2021

In the Supreme Court of the United States

OCTOBER TERM, 1988

WCCO RADIO, INC., A DIVISION OF MIDWEST COMMUNICATIONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner committed an unfair labor practice by refusing to comply with a request from the union representing petitioner's employees for information concerning petitioner's compensation of employees in the bargaining unit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A33-A42) is reported at 844 F.2d 511. The decision and order of the National Labor Relations Board (Board), including the opinion of the administrative law judge (Pet. App. A1-A33), is reported at 282 N.L.R.B. No. 159.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1988. The petition for a writ of certiorari was filed on June 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a radio station in Minneapolis, Minnesota. The American Federation of Television and Radio Artists, Twin Cities Local (Union) represents peti-

tioner's announcers, producers, staff broadcast journalists, staff traffic reporters, and staff broadcast meteorologists. Under the collective bargaining agreement between petitioner and the Union, which expired on March 31, 1986, the employees in the bargaining unit received a base salary and additional fees for the programs that they performed on the air. Fees varied according to the length, frequency, sponsorship, and type of program; some programs paid no fee at all. Pet. App. A5.

The collective bargaining agreement set forth specific salaries and fees for the various classes of performers, but provided that those amounts were only "minimum" terms. The contract permitted individual employees and petitioner to reach separate agreements, known as personal service contracts (PSCs), for compensation in excess of the minimums. Nine of the 35 unit employees reached individual agreements with petitioner. Pet. App. A5.

In January 1986, the Union, in preparation for bargaining for a new contract, requested certain information from petitioner. Among other things, the Union sought information about a retainer fee paid to the associate announcer, a list of all programs performed by the announcers and the fees paid for each of those programs, a list of the "salary, shifts, programs and fees attaching to each program" for the remaining employees, and a copy of all PSCs (Pet. App. A6-A7).[1] The Union wanted to learn the compensation that each unit employee received so that it could determine whether to bargain for higher minimum salaries and fees, and whether petitioner was complying with current contractual minimums (*id.* at A7-A8). When petitioner refused to supply the requested information, the Union filed an unfair labor practice charge (*id.* at A5-A6).

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[1] During contract negotiations in March, the Union amended its request to add other payroll and personnel data pertaining to the actual compensation and terms of employment of the unit employees (Pet. App. A12-A13).

2. The administrative law judge (ALJ) ruled that petitioner violated Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) by failing to supply the Union with the requested information (Pet. App. A29). The ALJ found that the requested information—"the specific details of the compensation of all unit members, including those paid pursuant to personal service contracts" (*id.* at A19)—was presumptively relevant to the Union's function as bargaining representative (*id.* at A20). He found that (*id.* at A21) the Union "needed the information in order to determine whether to bargain for higher minimums or greater benefits and protections in the collective-bargaining agreement applicable to all unit employees * * * [and] to assure itself that the earnings of the employees pursuant to personal service contracts at least met the minimum standards of the collective-bargaining agreement * * *."

The ALJ found that petitioner failed to rebut the presumption of relevance (Pet. App. A20). The ALJ rejected petitioner's contentions that information concerning individually negotiated contracts may be withheld because it is "irrelevant to the negotiations, that [it] might aid competitors in hiring away [petitioner's] employees, and that some employees might object or be offended by disclosure of their earnings to the union" (*id.* at A21). Those contentions, the ALJ noted, "have been raised by other employers and have been consistently rejected by the Board and the courts in strikingly similar cases over the last three decades" (*ibid.*). And the ALJ found that the requested information was not a "trade secret" because the unit employees were "under no proscription which would prohibit them from disclosing [salary and fees] information if they so desired" (*id.* at A26).

The Board affirmed the ALJ's findings and conclusions (Pet. App. A1). Accordingly, the Board ordered petitioner

to give the Union the requested information (*id.* at A2, A30-A31).

3. The court of appeals enforced the Board's order (Pet. App. A42). The court found that "[t]here is little doubt that the information requested by [the Union] is relevant" (*id.* at A38). The court rejected petitioner's contention that the relevancy of the information was rebutted by the Union's offer not to disclose the information to anyone other than its executive secretary and attorney. The court said that petitioner's contention ignored the facts that the executive secretary was the Union's chief negotiator and that the information was also sought to check compliance with the existing contract (*ibid.*). The court of appeals observed that the Union's offer to limit disclosure was simply intended to "accommodate wishes for confidentiality by handling the information discreetly" (*id.* at A39 (footnote omitted)).

Citing *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), the court of appeals acknowledged that relevant information may be withheld when an employer's interest in secrecy outweighs the union's need for the information (Pet. App. A39). The court, however, rejected petitioner's contention that the Board had not reasonably weighed the competing interests in this case. The court of appeals agreed with the Board that the requested information was not protected under Minnesota's trade secrets law. The court stated: "Since nothing prohibits disclosure by WCCO employees, competitors can legitimately obtain the information by simply asking the employees for it" (*id.* at A40).

ARGUMENT

The decision of the court of appeals is correct. That decision does not conflict with any decision of this Court or the courts of appeals. Thus, no further review is warranted.

1. It is well settled that "[t]he duty to bargain collectively, imposed upon an employer by § 8(a)(5) of the Na-

tional Labor Relations Act, includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co.* v. *NLRB*, 440 U.S. at 303 (footnote omitted). Accord *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB* v. *Truitt Mfg.*, 351 U.S. 149, 152 (1956). Petitioner does not dispute that point.

Nor does petitioner dispute that "[i]nformation pertaining to the wages, hours and working conditions of employees in the bargaining unit is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant." *Procter & Gamble Mfg.* v. *NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979). Accord *Oil, Chemical & Atomic Workers Local 6-418* v. *NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983); *Teleprompter Corp.* v. *NLRB*, 570 F.2d 4, 8 (1st Cir. 1977); *San Diego Newspaper Guild* v. *NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *NLRB* v. *Yawman & Erbe Mfg.*, 187 F.2d 947, 949 (2d Cir. 1951) (footnote omitted) ("[W]e find it difficult to conceive a case in which current or immediately past wage rates would not be relevant during negotiations for a minimum wage scale or for increased wages.").

Petitioner's contention (Pet. 8-12), instead, is the fact-specific one that it proved that the Union does not need the requested information in this case. As the court of appeals held, however, the Board's finding of relevance here is supported by substantial evidence.[2]

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[2] Relevance in this context is measured by a "discovery-type standard" (*NLRB* v. *Acme Indus. Co.*, 385 U.S. at 437). And the "Board's determination concerning whether information is relevant to the collective bargaining process is entitled to deference from the courts." *E.I. DuPont de Nemours & Co.* v. *NLRB*, 744 F.2d 536, 538 (6th Cir. 1984) (collecting cases).

Contrary to petitioner's assertion (Pet. 8), the fact that the Union did not express an interest in negotiating PSCs does not show that the requested information is irrelevant. The Board, with court approval, has consistently found that the terms of individually negotiated contracts are relevant to a union's task of negotiating minimum employment terms for all members of the bargaining unit. See *Detroit News, a Div. of the Evening News Ass'n*, 270 N.L.R.B. 380, 380-382 (1984), enforced mem., 759 F.2d 959 (D.C. Cir. 1985); *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58, 58-63 (1st Cir. 1955), enforcing 110 N.L.R.B. 2097 (1954); *Radio Station WLOL*, 181 N.L.R.B. 560, 560-562 (1970); *KCMO Broadcasting*, 145 N.L.R.B. 550, 551-553 (1963). Thus, as the Board and the court of appeals noted (Pet. App. A21, A38-A39), even if the Union had no intention of negotiating PSCs, the requested information was relevant to the Union's formulation of its proposals for contractual minimums and to its supervision of petitioner's compliance with the collective bargaining agreement.

Moreover, the Board's finding of relevance is not unsupported by the record simply because the Union's executive secretary gave assurances that individual wage data would not be disclosed to persons in the bargaining unit. As the court of appeals observed (Pet. App. A38-A39), he gave such assurances to accommodate concerns about confidentiality. And because the executive secretary was the Union's chief negotiator, the Union's decision to limit dissemination would not prevent the Union from using the information for its intended purposes.[3]

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[3] There is no basis for petitioner's assertion (Pet. 9-11) that the executive secretary is required by the duty of fair representation to disclose the requested information to employees in the bargaining unit. The cases cited by petitioner (*ibid.*) deal with the situation in which a union allegedly has violated its duty of fair representation by

2. Petitioner argues (Pet. 12-15) that the Board erred by concluding that the Union's need for the requested information outweighs petitioner's interest in secrecy. But, as the Court has often stressed, " 'balancing * * * conflicting legitimate interests * * * to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' " *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 501 (1978) (citation omitted). The Board did not abuse its discretion in this case.

Petitioner relies on Minnesota's trade secrets law (Pet. 14-15), but it cites no case holding that its employees' salaries are trade secrets.[4] Indeed, as petitioner acknowledges (Pet. 14), confidential information is a trade secret only if it "is the subject of reasonable efforts to maintain its secrecy." This requirement means, inter alia, that the employees must be under a "duty" not to disclose the information. *Electro-Craft Corp.* v. *Controlled Motion, Inc.*, 332 N.W.2d 890, 901 (Minn. 1983). Accord *Gordon Employment, Inc.* v. *Jewell*, 356 N.W.2d 738, 741 (Minn. Ct. App. 1984). As the court of appeals noted (Pet. App. A26), however, petitioner's employees

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misrepresenting or intentionally concealing the terms or consequences of an agreement with an employer to the detriment of employees. No such detriment is suggested here. In any event, even if petitioner's assertion were correct, it would not bear on the relevance of the requested information, but on the executive secretary's ability to meet his confidentiality commitment.

[4] Whether petitioner has a duty to provide the requested information is, of course, ultimately a question of federal law. See, *e.g.*, *Detroit Edison Co.* v. *NLRB*, 440 U.S. at 314-317.

are free to disclose their employment terms to petitioner's competitors. Hence, the court of appeals correctly held that the Board reasonably rejected petitioner's claim of privilege based on Minnesota law.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Of course, this Court generally does "not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

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